TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 523.

THE UNITED STATES, APPELLANT,

vs.

JOSEPH C. FINNELL.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 20, 1902.
(18376.)

1 In the Court of Claims.

JOSEPH C. FINNELL }
vs. } No. 21239.
THE UNITED STATES. }

I. *Petition—Filed January 30, 1899.*

To the Honorable Judges of the Court of Claims:

Your petitioner, Joseph C. Finnell, a citizen of the United States, and a resident of Covington, in the State of Kentucky, respectfully shows:

That from the 1st day of July, 1894, to the 30th day of June, 1898, he was clerk of the United States district and circuit courts for the district of Kentucky, duly qualified, and acted as said clerk.

That your petitioner presented to the accounting officers of the Treasury for payment his accounts for services as said clerk from the 1st day of July, 1894, to the 30th day of June, 1898, sworn to and duly
2 approved by the court, as required by the act of February 22, 1875, 18 Stat. L., 333; that in the settlement of said accounts the accounting officers disallowed and refused payment of fees for the following services, as per Exhibit "A," herewith attached.

Petitioner claims that, in accordance with the provisions of section 828 of the Revised Statutes of the United States, he is entitled to be paid by the United States for each of the services performed by him as aforesaid, and approved and allowed by the court; and though his accounts therefor have been duly presented to the accounting officers of the Treasury for payment of said fees, and although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to anyone for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court in accordance with law.

Your petitioner further avers that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof; that his whole compensation, if said fees were added, would not exceed the maximum compensation of $7,000 for any one year.

Wherefore your petitioner prays judgment against the defendant for $995.

JOSEPH C. FINNELL.

By his attorney:
CHARLES C. LANCASTER,
Washington, D. C.

3 EXHIBIT A.

The United States of America, Dr., to Joseph C. Finnell, clerk of the district and circuit courts of the United States for the district of Kentucky at Covington, for services rendered on behalf of the United States from July 1, 1894, to June 30, 1898, to wit:

Item 1. For attendance on court when court was opened by orders of the judge and business actually transacted in said court, 199 days, at $5.00 per day, disallowed, as follows:

Report	5,552, item 3	$50 00
"	6,097, item 2	15 00
"	16,561, item 1	10 00
"	18,950, item 1	85 00
"	18,951, item 1	10 00
"	22,992, item 2	65 00
"	22,993, item 1	105 00
"	24,257, item 1	30 00
"	27,171, item 1	5 00
"	27,576, item 1	40 00
"	30,298, item 1	55 00
"	30,299, item 1	65 00
"	30,374, item 1	20 00
"	34,368, item 1	90 00
"	34,369, item 1	20 00
"	37,206, item 1	80 00
"	37,207, item 1	5 00
"	38,954, item 1	10 00
"	39,775, item 2	90 00
"	43,686, item 1	70 00
"	46,849, item 1	5 00
"	46,850, item 1	70 00
	Total amount claimed	$995 00

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 30th day of January, 1899.

[SEAL.] ROBERT H. YOUNG,
Notary Public.

4 II. *Traverse—Filed February 20, 1901.*

JOSEPH C. FINNELL
vs.
THE UNITED STATES. } No. 21239. December term, A. D. 1900.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney-General.

5 III. *Findings of fact and conclusons of law.*

(Filed February 26, 1901.)

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, Joseph C. Finnell, was clerk of the district and circuit courts of the United States for the district of Kentucky from July 1, 1894, to June 30, 1898, duly qualified and acting.

II.

During said period he entered orders, decrees, and other proceedings of the court on 199 days, extending through said time. None of the judges of said courts were personally present at the time of the entry of such orders, decrees, and proceedings, but said orders, decrees, and proceedings were transmitted to the claimant by mail by the different judges composing the courts of said district. Said orders, decrees, and proceedings were endorsed: "Enter this order" (signed by the judge); or, "Enter this" (signed by the judge); or, "Enter" (signed by the judge). For the purpose of entering said orders, decrees, and other proceedings the claimant made the following entries on the journal for opening and adjourning court on the dates for which attendance is claimed: "Court met: Present, Hon. John W. Barr, sitting as circuit judge" (or Judge Taft, or Judge Lurton, or whoever may have been the judge sending the order. Then follows the entry of the order or other proceedings of the court for that day) and, "It is now ordered that court stand
6 adjourned until ." The date to which adjournment was had was left blank and when another such order, decree, or

other proceeding was received to be entered said blank was filled by entering therein the date on which the same was received, and another entry, similar to the above, opening and adjourning the court to a blank date was made. The record containing the entries of the opening and adjourning of court, the certified presence of the judge, and the orders, decrees, and other proceedings of the court was afterwards signed by the judge sending such orders, decrees, and other proceedings to be entered as the record of the court for the days on which the same were respectively entered. The exhibits A, B, and C, attached to and made a part of these findings, are illustrative copies of the record of the court upon such days.

The nature and character of business transacted on the days on which court was opened and adjourned, as aforesaid, is best shown by the following statement of the subject-matter of said orders, decrees, and other proceedings entered as aforesaid on the days actually claimed for:

Entry of order granting additional time to plead, 4 days.

Entry of order directing drawing of jury by jury commissioners, 18 days.

Entry of order granting restraining order, 5 days.

Entering orders disposing of sundry demurrers and motions, 21 days.

Entry of orders granting rule, 10 days.

Entry of orders granting application for writ of certiorari, 4 days.

7 Entry of orders granting petition for witnesses on behalf of the defendant at the cost of the United States, 7 days.

Entry of orders approving report of receivers, authorizing compromise by receiver, instructions issued to receiver, and various other orders pertaining to the appointment and conduct of receivers, 33 days.

Entry of orders and decrees finally disposing of cases, 17 days.

Sundry entries of orders granting writs of possession, approving bond of clerk of court, granting leave to withdraw exhibits, granting leave to file intervening petition, ordering sale of property, confirming sale of property, determining the priorities of liens, continuing cases, and granting appeals, 80 days.

III.

Claimant made his account for said services as attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, which was verified and presented to the United States Court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury

8 Department for payment, and payment of fees as per diems in Finding IV was refused.

IV.

Item 1. Per diems for attendance on court on the days on which said orders, decrees, and other proceedings were entered, 199 days, at $5 per day, $995.00.

V.

Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid by the accounting officers of the Treasury up to June 30, 1893.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, a majority of the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of nine hundred and ninety-five dollars ($995.00).

9 EXHIBIT A.

United States circuit court, district of Kentucky.

May term, Monday, October 15th, A. D. 1894.
Court met. Present: Hon. Wm. H. Taft, circuit judge.

JULIUS C. LANG, ADMR.)
vs.
THE CHES. & OHIO R. R. CO. ET AL.)

This cause coming on to be heard upon the motion of the Chesapeake and Ohio Railway Company for writ of certiorari and for a rehearing upon the motion to remand, the court having considered said motion and the affidavit filed herein, and the original petition for removal herein having been exhibited to the court, and being now duly advised, it is ordered that the clerk of the Kenton circuit court at Independence, Ky., be, and he hereby is, directed and ordered to make and transmit to the clerk of the United States circuit court for the district of Kentucky, at Covington, Kentucky, a true and correct transcript of the papers and proceedings in this case. The order remanding the case is now set aside and a rehearing of the motion to remand is hereby granted and is set for Saturday, October 20th, A. D. 1894, at 10 o'clock a. m. in chambers, at Cincinnati, Ohio.

It is now ordered that court stand adjourned until Friday, November 2nd, A. D. 1894.

10 EXHIBIT B.

United States circuit court, district of Kentucky.

May term, Thursday, September 6th, A. D. 1894.

Court met. Present: Hon. John W. Barr, sitting as circuit judge.

JOSIAH J. WHITE)
vs.
THE CHATTAROI RWY. CO. ET ALS.)

This cause coming on to be heard on the demurrer of the Ohio and Big Sandy R. R. Co. and the joint and several demurrer of the Ohio and Big Sandy R. R. Co., the Chesapeake and Ohio Rwy. Co., and the

Elizabethtown, Lexington and Big Sandy R. R. Co. to the bill of complaint, and the amended and supplemental bills of complaint of the complainant, Josiah J. White, the court now being fully advised of and concerning the matters and things in said demurrers contained, files its written opinion and orders and adjudges that said demurrers be and the same are overruled, to which ruling of the court defendants by counsel, W. H. Jackson, esq., and Hon. John F. Hager, come and accept.

It is now ordered that court stand adjourned until Monday, September 10, A. D. 1894.

11 EXHIBIT C.

United States circuit court, district of Kentucky.

May term, Friday, August 3rd, A. D. 1894.

Court met. Present: Hon. Horace H. Lurton, circuit judge.

SAMUEL C. WILLIAMS
vs.
THE EMPIRE COAL CO. OF KY.

Upon consideration of the bill filed herein on August 3rd, 1894, the court being advised it is ordered and adjudged that a restraining order issue herein, directed to the defendant company, commanding and restraining it, and all of its officers, agents, attorneys, and servants, from declaring any "bond dividend," or otherwise disposing of the issue of bonds mentioned in the bill, otherwise than by actual bona fide sale in open market, and for full market value, paid into the treasury of the company, until further order of the court; and it is further ordered that the defendant company be notified to appear before Hon. John W. Barr, or some other judge authorized to hold court in chambers, at Louisville, Ky., on the first Monday in October, 1894, at 10 o'clock a. m., and show cause why an injunction should not issue and a receiver be appointed as prayed for. It is further ordered that until this matter be disposed of, the proceeds of sale (if any shall be sold) of any of said bonds shall be held subject to the further order of this court.

It is now ordered that court stand adjourned until Wednesday, August 15th, A. D. 1894.

12 IV. *Judgment of the court.*

JOSEPH C. FINNELL
vs.
UNITED STATES. } No. 21239.

At a Court of Claims held in the city of Washington on the 26th day of February, 1901, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Joseph C. Finnell, do have and recover of and from the United States the sum of nine hundred and ninety-five dollars ($8995\frac{00}{100}$).

BY THE COURT.

13 *Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 26th day of February, 1901, in favor of claimant, the defendants by their Attorney-General, on the 3d day of April, 1901, make application for, and give notice of, an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed April 3, 1901.

The defendants' appeal in this case is allowed.

C. C. NOTT,
Chief Justice.

OCTOBER 1, 1901.

14 Court of Claims.

JOSEPH C. FINNELL
vs.
UNITED STATES. } No. 21239.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 16th day of January, A. D. 1902.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 18376. Court of Claims. Term No. 523. The United States, appellant, *vs.* Joseph C. Finnell. Filed January 20, 1902.

O

No. 523.

(Br. of Atty. Gen. (Load) for Appt.

Filed Mar. 8, 1902.

Office Supreme Court U. S.
FILED
MAR 8 1902
JAMES H. MCKENNEY
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS,
v.
JOSEPH C. FINNELL. } No. 523.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS, v. JOSEPH C. FINNELL. } No. 523.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANTS.

STATEMENT OF CASE.

The appellee was clerk of the district and circuit courts of the United States for the district of Kentucky from July 1, 1894, to June 30, 1898. He brought suit in the Court of Claims for the sum of $995 alleged to be due him for attendance on court on one hundred and ninety-nine different days within said period "when the court was opened and adjourned by order of the judge, and while the same was actually in session and business actually transacted." Upon the trial of the case the court, by a majority decision, allowed him the full amount of his said charges and rendered judgment therefor, from which the United States have appealed to this court.

The appellee had his office in the city of Covington, Ky. It was the practice and custom of the judges constituting the courts in said district to transmit orders, decrees, and other proceedings to the clerk at his office by mail. Said judges made the following indorsement thereon: "Enter this order," or "Enter this," or "Enter" (signed by the judge). Upon the receipt of such an order, decree, or other proceeding so indorsed, the appellee entered upon the journal the following: "Court met: Present, Hon. John W. Barr, sitting as circuit judge" (or whoever may have been the judge sending the order). He would then enter on the journal the order, decree or other proceedings received as aforesaid and close with the following: "It is now ordered that court stand adjourned until ———." When another such order indorsed as aforesaid was received the appellee would fill the blank in the foregoing entry of adjournment by inserting the date of the receipt of the succeeding order or decree and make entries opening and adjourning the court until blank date similar to those above indicated. None of the judges of said court were personally present in said city of Covington on any of said days. However, the journal of the court containing said entries was afterwards signed by the respective judges sending the orders, decrees, and other proceedings entered as aforesaid. In this manner the appellee made entries opening and adjourning the court on 199 different days extending through said period. (See finding 2, Record, pp. 3 and 4.)

The appellee made his account for said services as for attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, at $5 per day. Said account was regularly and duly approved by the court but the payment of per diems for said services was refused by the Treasury Department. (See findings 3 and 4, Record, p. 4.)

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the appellants and in favor of the appellee on the findings of fact as set forth in findings 2, 3, and 4. (Record, pp. 3 and 4.)

ARGUMENT.

Section 828, Revised Statutes, paragraph 18, provides that a clerk of the United States courts shall receive "five dollars a day for his attendance on the court while actually in session."

The act of March 3, 1887 (24 Stats. L., 541), provides that "hereafter no part of any appropriation shall be used in payment of * * * a per diem compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is open[ed] by the judge for business, or business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which facts shall be certified in the approval of their accounts."

These sections provide in substance as follows:

583. That in case the judge of the district court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned to the next regular term, or any earlier day, by the marshal, by virtue of a written order directed to him by the judge.

584. That in case the judge of any district court in certain States named, including Kentucky, is not present at the time for opening the court, the clerk may open and adjourn court from day to day for four days, and if the judge does not appear on the fourth day the clerk shall adjourn the court to the next regular term.

671. Provides that in case neither of the judges of the circuit court is present to open any session, the marshal may adjourn the court from day to day until the close of the fourth day, and that if no judge be then present he shall adjourn the court to the next regular term.

672. Provides that if neither of the judges of the circuit court be present to open and adjourn any regular or adjourned special session, either of them may, by a written order directed alternately to the marshal, or, in case of his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before next regular term.

2013. Has been repealed. It had reference to the circuit court's functions in election matters.

It is perfectly apparent that the per diems claimed

in this case do not come under any of the above-named sections, and it is our contention that the services performed by the appellee do not entitle him to a per diem compensation under the first condition named in the act of 1887, to wit, "when the court is opened by the judge for business or business actually transacted in court." The court at Covington could not have been opened by the judge on the days claimed, because there was no judge present. (Finding 2, Rec., p. 3.) No business—that is, no judicial business—was transacted on said days, because none could be in the absence of the judge; there was no court open. It will no doubt be contended on behalf of the appellee that under the act of 1887 the clerk is entitled to a per diem fee when "business is actually transacted in court," whether the same has been opened by the judge for business or not. It will be observed that in the act of March 3, 1887, the word "or" is used in a connection which seemingly makes it provide for per diems when "business is actually transacted in court," as well as when court is "opened by the judge for business;" that is to say, it seemingly implies that business might be transacted in court without the court first having been opened by the judge for business, or that business may be transacted in court in the absence of the judge and without the formality of the court being opened. That such is the intention of the act aforesaid is inconceivable; and even if it was, it would be futile, for courts without judges have not yet been established as a part

of our judicial system. A court can have no existence without a judge, and no business can be "transacted in court" until court be opened by the judge. This is a proposition so elemental that it is unnecessary to support it by argument or the citation of authorities.

What the Congress no doubt intended to provide by the act of March 3, 1887, was that the clerk, along with other officers, should be entitled to per diem compensation for days when court is opened by the judge for business, whether business is actually transacted in court on said days or not, and when said officers attend under sections 583 et seq. In the sundry civil appropriation act of August 4, 1886 (24 Stat. L., 222, 253), Congress provided, among other things, that the clerk should not receive a per diem compensation for attendance in court "except for days when business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which fact shall be certified in the approval of their accounts."

This provision limited the per diem compensation of clerks and marshals to "days when business is actually transacted in court" and when they attend under the sections of the statute therein named. Presumably the purpose of making the exception named in said appropriation act, limiting the clerk to per diems for days "when business is actually transacted in court," was to break up the practice of allowing clerks per diems for

attendance on the court when the same was opened by the judge and adjourned to the next or a subsequent day of the term without transacting any business other than opening and adjourning the court. This had been the practice of the accounting officers for nearly forty years, and it had been sanctioned by an unbroken line of decisions of the Court of Claims, the Federal courts, and the Supreme Court. (21 C. Cls. R., p. 1; 23 C. Cls. R., 142; 35 Fed. Rep., 193; 37 Fed. Rep., 470; 58 Fed. Rep., 688; 60 Fed. Rep., 883; 147 U. S., 669.) Thus it is seen the clerks and other officers were for the first time in forty years denied per diem fees for attendance upon court when nothing was done but to open and adjourn the same; and one may readily believe that when Congress next assembled after the passage of this act the attention of the members would be called to this fact. The section of the act of 1886, above referred to, was temporary in its character, and the prohibition of such per diem fees expired by limitation at the end of the fiscal year. Looking at the history of the act of 1887, we are constrained to believe that Congress intended to restore the condition which existed with reference to per diems to clerks and other officers as it was prior to the act of 1886. When the sundry civil act of March 3, 1887, passed the House, the clause limiting the clerks' and other officers' per diems to days when business was actually transacted in court, and when they attend under section 583 and those following, was retained

exactly as it was in the appropriation act of 1886. (Vol. 18, pt. 1, p. 253, Cong. Rec. and House Rep. No. 3477.)

The Senate Committee on Appropriations offered and the Senate adopted the following amendment: "In line 2392, after the word 'when,' insert 'the court is opened for business or' so as to read:

> Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal, for attendance in court except for days when the court is opened for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts. (Vol. 18, pt. 2, p. 1229, Cong. Rec.)

Afterwards in conference this section was still further amended by striking out the word "opened" in the foregoing provision and inserting "opened by the judge." (Vol. 18, pt. 3, p. 2606, Cong. Rec.) The conference report was adopted, the bill passed, and in due season signed by the Chief Executive.

There is nothing in the Senate Appropriation Committee's report or the conference committee reports indicating the reasons which moved these respective committees to make the amendments aforesaid, but it is perfectly manifest from the nature of the amendments that they were made for the purpose of changing the condition which then existed under the act of 1886 and insuring to clerks and other officers per diem

fees for attendance on court on days when the court was opened by the judge for business, even though no business was transacted. The clause "or business is actually transacted in court" might very well have been omitted, for the days on which business was transacted in court would necessarily be included with the days on which the court was "opened by the judge for business." This section should be construed as if it read, "nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance on court except for days when business is actually transacted in court or the court is opened by the judge for business, and when they attend under sections 583 and those following." Giving the statute this construction does not require the elimination of the clause "or business is actually transacted in court." Courts will always endeavor to give power and expression to words and phrases which occur in statutes. It is perhaps true that the meaning which must be given to this statute would have been the same if the words "or business is actually transacted in court" had been entirely omitted; but it is submitted that their presence in the statute does not render it ambiguous or uncertain, and when transposed as above indicated and taken in connection with the purpose which the Congress evidently had in view, they were not improperly used.

Various constructions have been placed upon this section of the act of 1887 by the accounting officers and the Court of Claims. (*Dart case*, 32 C. Cls. R.,

267; *Ackiss*, 31 C. Cls. R., 283; *Converse*, 26 C. Cls. R., 6; 5 Compt. Dec., 403 and 735; 4 Compt. Dec., 161 and 508; Compt. Bowler's Dec., p. 78.)

In view, therefore, of the fact before stated—that no judge of the Federal courts in the State of Kentucky was present at the time and place where the appellee made the entries opening and adjourning the court, as aforesaid—it follows that the court was not opened by the judge for business, nor was any business transacted in court on the days charged within the meaning of the act of March 3, 1887, and, consequently, the allowance of per diem fees for said services was an error.

It may be insisted by the counsel for the appellee that under section 574, Revised Statutes, the court is opened by operation of the law whenever any pleading is filed or any mesne and final process issued or any interlocutory motion or order made and filed therein, so as to entitle him to a per diem fee under section 828, Revised Statutes. Section 574 is as follows:

> The district courts, as courts of admiralty, and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make and direct and

> award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

It is our contention that the act of March 3, 1887, so far as it applies to per diems of clerks and other officers, is supplementary to the eighteenth paragraph of section 828, and further that it is exclusive in its operation. If it had been intended to grant clerks and other officers per diem fees for days on which business was transacted in the court, under section 574, the proper and natural thing would have been to include said section along with the other sections named in the aforesaid act of 1887. The right of a clerk or other United States court officer to compensation for services rendered depends upon the very provisions of the statute. (*Patterson case*, 150 U. S., 65.) The very fact that the Congress omitted section 574 in the enumeration of those sections, for attendance under which the clerk and other officers might receive per diem compensation, leads irresistibly to the conclusion that per diem fees under section 574 are not only not provided for by statute, but are positively prohibited thereby.

PHILIP M. ASHFORD,
Assistant Attorney.
LOUIS A. PRADT,
Assistant Attorney-General.

O

No. 523.

Br. of Lancaster for Appellee

Office Supreme Court U.S.
FILED
MAR 21 1902
JAMES H. McKENNEY,
Clerk.

Filed Mar. 21, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 523.

THE UNITED STATES, Appellant,

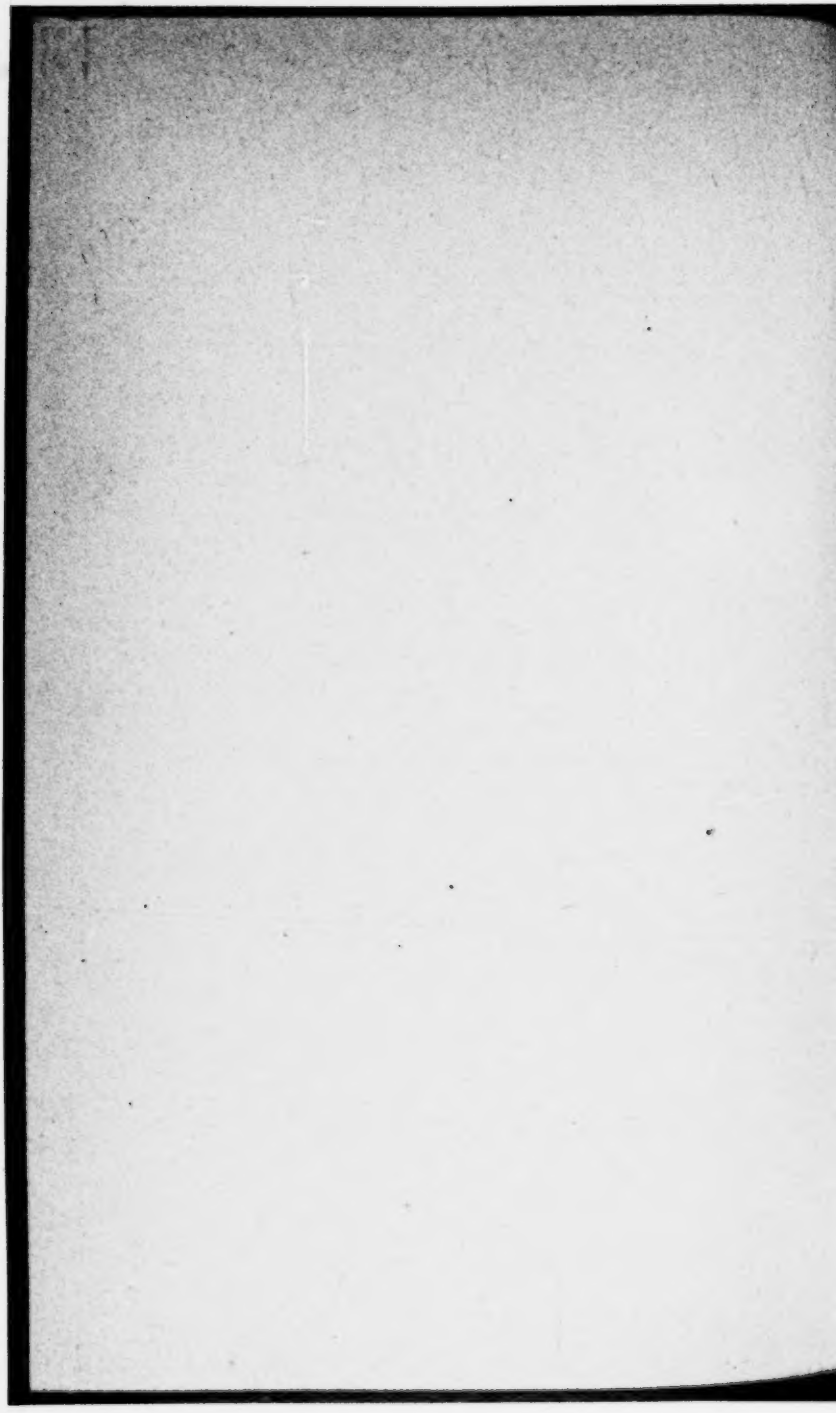
vs.

JOSEPH C. FINNELL, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, Appellant,
vs.
JOSEPH C. FINNELL, Appellee. } No. 523.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Claims in favor of the claimant, the appellee. The Court found the following facts:

I.

The claimant, Joseph C. Finnell, was clerk of the District and Circuit Courts of the United States for the District of Kentucky from July 1, 1894, to June 30, 1898, duly qualified and acting.

II.

During said period he entered orders, decrees and other proceedings of the court on 199 days, extending through said time. None of the judges of said courts were personally present at the time of the entry of such orders, decrees and proceedings, but said orders, decrees and proceedings were transmitted to the claimant by mail by the different judges composing the courts of said district. Said orders, decrees and proceedings were endorsed: "Enter this order" (signed by the judge); or, "Enter this" (signed by the judge); or,

"Enter" (signed by the judge). For the purpose of entering said orders, decrees and other proceedings the claimant made the following entries on the journal for opening and adjourning court on the dates for which attendance is claimed: "Court met. Present, Hon. John W. Barr, sitting as circuit judge;" (or Judge Taft, or Judge Lurton, or whoever may have been the judge sending the order. Then follows the entry of the order or other proceedings of the .... court for that day) and, "It is now ordered that court stand adjourned until ....." The date to which adjournment was had was left blank, and when another such order, decree, or other proceeding was received to be entered said blank was filled by entering therein the date on which the same was received, and another entry, similar to the above, opening and adjourning the court to a blank date was made. The record containing the entries of the opening and adjourning of court, the certified presence of the judge, and the orders, decrees and other proceedings of the court was afterwards signed by the judge sending such orders, decrees and other proceedings to be entered as the record of the court for the days on which the same were respectively entered. The exhibits, A, B and C, attached to and made a part of these findings, are illustrative copies of the record of the court upon such days.

The nature and character of business transacted on the days on which court was opened and adjourned, as aforesaid, is best shown by the following statement of the subject-matter of said orders, decrees and other proceedings entered as aforesaid on the days actually claimed for:

Entry of order granting additional time to plead, 4 days.

Entry of order directing drawing of jury by jury commissioners, 18 days.

Entry of order granting restraining order, 5 days.

Entering orders disposing of sundry demurrers and motions, 21 days.

Entry of orders granting rule, 10 days.

Entry of orders granting application for writ of certiorari, 4 days.

Entry of orders granting petition for witnesses on behalf of the defendant at the cost of the United States, 7 days.

Entry of orders approving report of receivers, authorizing compromise by receiver, instructions issued to receiver, and various other orders pertaining to the appointment and conduct of receivers, 33 days.

Entry of orders and decrees finally disposing of cases, 17 days.

Sundry entries of orders granting writs of possession, approving bond of clerk of court, granting leave to withdraw exhibits, granting leave to file intervening petition, ordering sale of property, confirming sale of property, determining the priorities of liens, continuing cases, and granting appeals, 80 days.

III.

Claimant made his account for said services as attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, which was verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of fees as per diems in Finding IV was refused.

IV.

Item 1.—Per diems for attendance on court on the days on which said orders, decrees and other proceedings were entered, 199 days, at $5.00 per day..... $995.00

V.

Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed

and paid by the accounting officers of the Treasury up to June 30, 1893.

CONCLUSION OF LAW.

Upon the foregoing findings of fact a majority of the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of nine hundred and ninety-five dollars ($995.00).

BRIEF OF ARGUMENT.

Counsel for appellant assign error in the 2d, 3d and 4th findings of fact, but concede the 5th finding of fact, the legal effect of which is later considered herein.

It will thus be seen from the above findings of fact that the court was opened by orders of the judge and in actual session; that the appellee as clerk of said court was in actual attendance on said court each and every day claimed, and that judicial business was actually transacted on said days.

These facts, established by the record, clearly entitle the clerk to his per diems for attendance under section 828, Revised Statutes, and the provision in the act of March 3, 1887, 24 Stats., 541, which reads:

"Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is opened by the judge for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts."

The record shows that this provision has been fully complied with. The court was opened by orders of the judge, judicial business was transacted, and the clerk was in actual attendance on the court.

The record also shows in the 3d finding of fact that the appellee made up his accounts for said services as attendance on court when the same was opened and adjourned by order

of the judge and while the same was actually in session and business actually transacted, which were verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just according to law were entered of record.

The record further shows in the 5th finding of fact that charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid by the accounting officers of the Treasury up to June 30, 1893, a period of over ten years.

From this record it follows, as a legal sequence, that the appellee is by law entitled to his per diems, and the approval of the court is *prima facie* evidence of the correctness of the items of said accounts, and, in the absence of *clear* and *unequivocal* proof of mistake on the part of the court, is conclusive.

U. S. *vs.* Jones, 134 U. S., 483.
U. S. *vs.* King, 147 U. S., 681, par. 2.
Jones *vs.* U. S., 21 Ct. Cls., 1.
Butler *vs.* U. S., 87 Fed. Rep., 655.

Counsel for appellant, however, in their assignment of errors and brief, endeavor to set aside this *prima facie* character of the approval of court and to show that the court made a mistake in approving the appellee's accounts by raising an objection, which is set forth in their brief on page 5:

"The court at Covington could not have been opened by the judge on the days claimed, because there was no judge present. No business—that is, judicial business—was transacted on said days, because none could be in the absence of the judge; there was no court open."

And, to sustain said objection, cite sections 583, 584, 671, 672 and the provision of the act of March 3, 1887, *supra*.

As a matter of fact, the answer to this objection is found in the findings of fact (R., p. 4), as follows:

"The record containing the entries of the opening and ad-

journing of court, the certified presence of the judge, and the orders, decrees and other proceedings of the court was afterwards signed by the judge sending such orders, decrees and other proceedings to be entered as the record of the court for the days on which the same were respectively entered."

The judges signing this record were Hon. John W. Barr, sitting as circuit judge; Hon. William H. Taft, circuit judge, and Hon. Horace H. Lurton, circuit judge, and it must be evident that these eminent judges would not have signed the record of the court's proceedings had they not been satisfied that the court was open and judicial business transacted.

Sections 583, 548, 671 and 672, R. S., have no application here, for the attendance was not on the court at the commencement or opening of any regular, adjourned or special term or session of the court, but during the regular session or term under sections 574 and 638, Revised Statutes.

While the record shows (R., pp. 5, 6, Exh. A, B, C) that the judges of the court were present on each day the court was opened, the findings of fact show that they were not personally present, but that the court was opened by their orders and the journal proceedings were afterwards signed by them *nunc pro tunc*

By reason of this fact counsel for appellant attack the right of the court to open and to transact any judicial business. But this contention has been squarely overruled.

In the Pitman case, 147 U. S., 671, where the same legal principle was involved, this court, speaking through Justice Brown, announced the law of the case in clear and conclusive language. He said:

"After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after the regular business of the term has been concluded, is a matter which rests in the discretion of the presiding judge. It is presumed that he will act in this particular in what he

conceives to be the interest of the public, and that he will put the Government to no unnecessary expense. It is clearly the duty of the officers of the court to be present at the adjourned day, and to obey the written order of the judge with respect to any further adjournment, and there is no reason why they should not receive their per diem therefor as if the judge were actually present." * * *

"We think the court should be deemed 'actually in session,' within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge. That this was the construction placed upon these sections by Congress is evident by the civil appropriation act of March 3, 1887, 24 Stats., 509, 541."

This interpretation of the law was subsequently followed by the circuit court of appeals in U. S. *vs.* Aldrich, 58 Fed. Rep., 688.

This same question has been learnedly treated by District Judge Baker and decided in favor of the claimant. (Butler *vs.* U. S., 87 Fed. Rep., 655.)

A most significant fact bearing on this appeal is that the appellee recovered judgment in the Court of Claims in a former suit involving similar facts and law, and, as no appeal was taken by the Attorney General, the judgment was paid. (Finnell *vs.* U. S., 32 Ct. Cls., 634.)

As the findings of fact were not printed by that court, a certified copy is here inserted for the information of this court. (Appendix A.)

EFFECT OF THE COURT'S ORDER.

The record conclusively shows that the court was opened by orders of the various judges, and, in obedience to said orders, the clerk was in attendance on said court each and every day claimed.

In the Van Duzee case, 140 U. S., 118, this court held:

"When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

EFFECT OF LONG-CONTINUED PRACTICE OF THE COURT AND DEPARTMENT.

The practice of the court in this district, as shown by this record, has existed for over ten years, and has received the approval of the judges and district attorney. It further shows that the Treasury Department and Department of Justice have acquiesced in said practice for the same period, without exception, by paying the clerk his per diems for said attendance.

In considering a similar question of practice, this court, in the McDermott case, 140 U. S., 151, held:

"The local practice of Kentucky, as well as the almost universal practice of commissioners to draw these complaints themselves, is ample justification for this charge. It appears to have been the practice of the Department of Justice for the past twenty years to allow these as proper charges for drawing complaints, and if there were any doubt as to the propriety of their allowance, such doubt, in view of this long-continued practice, should be resolved against the Government."

The same principle is sustained in—

U. S. *vs.* Taylor, 147 U. S., 697, par. 5.
U. S. *vs.* Kurtz, 164 U. S., 53, par. 4.
U. S. *vs.* Dundy, 76 Fed. Rep., 357.

The power of the judges to open and adjourn their courts and transact judicial business cannot be attacked in this appeal by denying the clerk his per diems for attendance.

In the Jones case, 147 U. S., 675, this court held:

"The account in question is clearly within this section. Supposing it, however, to be a question of doubt, if the court assumed jurisdiction to make such order, and the clerk obeyed

it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity for such order being made. In fact, he would be guilty of contempt in refusing to make such entry. The Government cannot in this collateral proceeding attack the power of the court to make this order."

In the Payne case, 147 U. S., 689, this court also held:

"While a writ of *alias fi. fa.* is ordinarily issued upon a simple præcipe, it is perfectly competent for the district attorney to apply to the court for an order for that purpose, and, if such order be made, the clerk is clearly bound to enter it, and is entitled to his fee therefor, whether such order be necessary or not, or, indeed, whether the court had any right to enter it or not. The propriety of such an order cannot be tested upon the application of the clerk for his fee for entering it."

Upon the whole record herein, it is submitted that no error exists, and that the appeal should be dismissed.

CHARLES C. LANCASTER,
Counsel for Appellee.

APPENDIX A.

Court of Claims.

JOSEPH C. FINNELL
vs.
THE UNITED STATES. } No. 18,693.

Findings of Fact.

Filed February 18, 1897. J. R.

This case having been heard by the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

The claimant, Joseph C. Finnell, was a Clerk of the District and Circuit Courts of the United States for the District of Kentucky from January 1, 1892, to June 30, 1894, duly qualified and acting.

II.

During said period he was in attendance on court when court was opened and adjourned by orders of the judges and business actually transacted, 164 days, at $5.00 per day. The journal shows the following entries for opening and adjourning court on the days for which attendance is claimed: "Court met. Present, Hon. John W. Barr, sitting as circuit judge (or whoever may have been the acting judge);" and "it is now ordered that court stand adjourned until the .... day of ...., 189.." on which day the court met pursuant to said order. But the judge was not personally present in court on those days. The exhibits, A, B and C, attached to these findings, are illustrative copies of the record of the court on such days.

III.

He made up his accounts for said attendance, duly verified, and presented the same to the United States court for approval in the presence of the district attorney, and orders

approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of per diems in Finding IV was refused.

IV.

Item 1.—For attendance on court when court was opened and adjourned by orders of the judges and business actually transacted, 164 days, at $5.00 per day $820.00

V.

In the settlement of accounts from January 1, 1892, to June 30, 1893, the accounting officers allowed 105 per diems aforesaid, at $5.00 per day, amounting to $525, and closed the accounts. Subsequently, in the adjustment of accounts from July 1, 1893, to December 31, 1893, the accounting officers deducted an amount of $525, otherwise legal, as a set-off for said 105 per diems heretofore made and allowed, and recharged and disallowed the same in these accounts.

VI.

The court was actually opened and adjourned by orders of the judge for the transaction of business, and business was actually transacted, the number of days charged in said accounts, and the clerk was in actual attendance on the court each and every day claimed, in accordance with the practice in this district.

VII.

The character of the work done on the days claimed was such as is usually transacted in court, such as making an entry on the minutes each day that the court was opened and adjourned by orders of the judge, the appointment of receivers, granting injunctions, issuing restraining orders, ordering attachments for contempt, extending time for reports and pleadings, and making orders and decrees in various cases heard and decided. The proceedings of each day were witnessed

on the journal by the signature of the presiding judge at the time.

Under the practice of the Federal courts in Kentucky, the equity side of the court is always open for the transaction of business, and on such days as business is actually transacted court is opened and the necessary entries made upon the journal. This practice began with and has uninterruptedly continued since the establishment of the courts in Kentucky. The duties of the clerk are identical with those rendered by him at regular terms, with a jury in attendance.

VIII.

Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid for the entire period from 1882 to June 30, 1895, except as shown in this case.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment in the sum of eight hundred and twenty dollars ($820.00).

EXHIBIT "A."

United States Circuit Court, District of Kentucky.

December term, Tuesday, May 2nd, A. D. 1893.

Court met. Present: Hon. John W. Barr, sitting as circuit judge.

H. P. LLOYD, Trustee, etc., *vs.* ADAM WAGNER ET ALS. } 1720.

For good cause shown and by consent of all parties hereto, it is ordered that this action be, and the same is hereby, dismissed as to H. A. Shriver and Agnes Wiedman, executrix,

but without prejudice to the rights of complainants to proceed against the other defendants herein; and it is adjudged that the said Shriver and Agnes Wiedman, executrix, shall pay all the costs of this case to date, including an allowance to the commissioner, R. P. Ernst, of $1,000.00, out of which he shall pay all expenses of said reference, allowed by the order of reference herein, and which may have been incurred by him, and that the said Shriver and said Wiedman pay an allowance to the attorneys for complainants in such sum as has been agreed upon by counsel for said sureties and said complainants, which Shriver and Wiedman having done, they are now adjudged to be discharged of all liability growing out of any of the matters and things involved in this action, and for all costs and allowances herein.

And this cause is continued for further proceedings.

It is now ordered that court stand adjourned until court in course.

JNO. W. BARR.

EXHIBIT "B."

United States Circuit Court, District of Kentucky.

May term, Saturday, July 1st, A. D. 1893.

Court met. Present: Hon. Wm. H. Taft, judge.

J. O. COLE
vs.
C. CRANE ET ALS. } 1842.

Upon application to the court, it is hereby ordered that a rule issue against T. R. Brown and J. O. Kelly, returnable Saturday, July 8th, 1893, at ten o'clock a. m., requiring them and each of them to show cause why they and each of them should not be attached for contempt for attaching or causing to be attached and detained one horse, called "No Clothes;" one horse, called "Black Frank;" a set of harness and one buggy and rigging, in the custody and control of C. W. Baker, as receiver of this court herein.

It is now ordered that court stand adjourned until Monday, July 3rd, A. D. 1893.

WM. H. TAFT.

EXHIBIT "C."

United States Circuit Court, District of Kentucky.

May term, Tuesday, August 1st, A. D. 1893.

Court met. Present: Hon. John W. Barr, sitting as circuit judge.

M. SCHAMBERG
vs. } 1846.
JAS. H. & J. B. LESLIE.

This cause being heard upon the motion of complainant for a restraining order, the complainant tendered and asked leave to file an amended bill of complaint, which is granted, and said amended bill is ordered to be filed.

M. SCHAMBERG
vs.
JAS. H. & J. B. LESLIE.

This cause being heard upon the bill and amended bill and the motion of complainant for a restraining order, upon notice to defendants, given July 28, 1893, it is ordered that the defendants, James Henry Leslie and John B. Leslie, and their agents and servants and all other persons, are enjoined and restrained until further order of the court from proceeding further against the complainant or his property under a certain judgment rendered by this court at its June term, held at the city of Frankfort, in a certain action then and there depending, wherein James H. Leslie, the defendant herein, was plaintiff and complainant herein, M. Schamberg, was defendant, said judgment being for the sum of forty-six hundred and sixty-seven dollars ($4,667.00), with interest. But this order shall not issue until bond shall be executed by the complainant, with surety, to be approved by the clerk of the court, at Covington, in the sum of eight thousand dollars, conditioned to pay the damages and all injury sustained by the defendants by reason of the injunction, if the order therefor shall have been wrongfully obtained or said injunction be dissolved.

It is now ordered that court stand adjourned until Saturday, August 19, 1893.

JNO. W. BARR.

Judgment of the Court.

JOSEPH C. FINNELL
vs.
THE UNITED STATES. } No. 18,693.

At a Court of Claims held in the city of Washington on the 18th day of February, A. D. 1897, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge and decree that the claimant, Joseph C. Finnel, do have and recover of and from the United States the sum of eight hundred and twenty dollars ($820.00).

BY THE COURT.

Court of Claims.

WASHINGTON, D. C.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the findings of fact and conclusion of law filed by the court and of the judgment of the court in the above-entitled cause as filed and entered on the 18th day of February, A. D. 1897.

Test this 8th day of March, A. D. 1902.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

Supreme Court of the United States.

No. 523.—October Term, 1901.

The United States, Appellant, vs. Joseph C. Finnell. } Appeal from the Court of Claims.

[April 21st 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

The appellee was clerk of the District and Circuit Courts for the Kentucky District from July 1st 1894 to June 30th 1898, his office, during that period and previously, being in the city of Covington, one of the places at which those courts were held. The District Judge resided in the city of Louisville, while the Circuit Judges resided in other States.

The clerk presented to the proper officers of the Treasury for payment his account for certain services rendered during the above period, amounting to $995.

The account was sworn to and approved as required by the act of February 22d 1875, which provides, among other things, that before "any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States Circuit or District Court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court thereupon shall cause to be entered of record an order approving or disapproving the account, as may be according to law, and just." 18 *Stat.* 333, *c.* 95, § 1.

Payment of the account having been refused, this suit was brought against the United States, the petitioner averring that "his whole compensation, if said fees were added, would not exceed the maximum compensation of $7,000 for any one year."

Judgment having been entered in favor of the plaintiff for the amount sued for, the Government has prosecuted this appeal.

The findings of fact upon which the judgment below was based were as follows:

"I. The claimant, Joseph C. Finnell, was clerk of the District and Circuit Courts of the United States for the District of Kentucky from July 1st 1894 to June 30th 1898, duly qualified and acting.

"II. During said period he entered orders, decrees and other proceedings of the court on 199 days, extending through said time. None of the judges of said courts were personally present at the time of the entry of such orders, decrees and proceedings, but said orders, decrees and proceedings were transmitted to the claimant by mail by the different judges composing the courts of said district. Said orders, decrees and proceedings were endorsed: 'Enter this order' (signed by the judge); or, 'Enter this' (signed by the judge); or, 'Enter' (signed by the judge). For the purpose of entering said orders, decrees and other proceedings the claimant made the following entries on the journal for opening and adjourning court on the dates for which attendance is claimed: 'Court met: Present, Hon. John W. Barr, sitting as Circuit Judge' (or Judge Taft, or Judge Lurton, or whoever may have been the judge sending the order. Then follows the entry of the order or other proceedings of the court for that day) and, 'It is now ordered that the court stand adjourned until .' The date to which adjournment was had was left blank and when another such order, decree or other proceeding was received to be entered said blank was filled by entering therein the date on which the same was received, and another entry, similar to the above, opening and adjourning the court to a blank date was made. The record containing the entries of the opening and adjourning of court, the certified presence of the judge, and the orders, decrees and other proceedings of the court was afterwards signed by the judge sending such orders, decrees and other proceedings to be entered as the record of the court for the days on which the same were respectively entered. The Exhibits A, B and C, attached to and made a part of these findings, are illustrative copies of the record of the court upon such days.

"The nature and character of business transacted on the days on which court was opened and adjourned, as aforesaid, is best shown by the following statement of the subject-matter of said orders, decrees, and other proceedings entered as aforesaid on the days actually claimed for:

"Entry of order granting additional time to plead, 4 days.

"Entry of order directing drawing of jury by jury commissioners, 18 days.

"Entry of order granting restraining order, 5 days.

"Entering orders disposing of sundry demurrers and motions, 21 days.

"Entry of orders granting rule, 10 days.

"Entry of orders granting application for writ of certiorari, 4 days.

"Entry of orders granting petition for witnesses on behalf of the defendant at the cost of the United States, 7 days.

"Entry of orders approving report of receivers, authorizing compromise by receiver, instructions issued to receiver, and various other orders pertaining to the appointment and conduct of receivers, 33 days.

"Entry of orders and decrees finally disposing of cases, 17 days.

"Sundry entries of orders granting writs of possession, approving bond of clerk of court, granting leave to withdraw exhibits, granting leave to file intervening petition, ordering sale of property, confirming sale of property, determining the priorities of liens, continuing cases, and granting appeals, 80 days.

"III. Claimant made his account for said services as attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, which was verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of fees as per diems in Finding IV was refused.

"IV. Item 1. Per diems for attendance on court on the days on which said orders, decrees and other proceedings were entered, 199 days, at $5 per day, $995.

"V. Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid by the accounting officers of the Treasury up to June 30th 1893."

By section 828 of the Revised Statutes, a clerk of a Circuit or District Court of the United States was allowed "five dollars a day for his attendance on the court while actually in session."

This section was similar to one in the act of February 26th 1853, *c.* 80, 10 *Stat.* 161, 163. Under that act clerks were allowed five dollars a day for attendance only, whether business was transacted or not by the court. After many years had expired, Comptroller of the Treasury Durham held that interpretation of the statute to be erroneous, and ruled that the transaction of business was a condition precedent to the right to a per diem compensation for attendance, although the court may have been, in fact, regularly opened for business and awaited the coming of suitors. But the Court of Claims held, in 1885, that the Comptroller was in error, and adjudged that within the meaning of section 828 the clerk was entitled to five dollars a day for his attendance on court even when no business was transacted. *Jones* v. *United States*, 21 *Ct. Cl.* 1.

The judgment of that court did not, however, put the matter at rest; for, by the Sundry Civil Appropriations Act of August 4th 1886, *c.* 902, it was provided that no part of the money appropriated *by that act* should "be used in payment of a per diem compensation to any clerk or marshal for attendance in court except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the

approval of their accounts." 24 *Stat.* 222, 253. That act, by its terms, was temporary.

At the subsequent session of Congress the subject was again considered, and resulted in a permanent provision to be found in the Sundry Civil Appropriations Act of March 3d 1887, *c.* 362. By that act it was provided "that *hereafter* no part of the appropriations made for the fees for United States marshals or clerks shall be used, &c., . . nor shall *any part of any money appropriated* be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court, except for days when the court is opened by the judge for business, *or* business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which facts shall be certified in the approval of their accounts." 24 *Stat.* 509, 541.

The sections of the Revised Statutes referred to in the act of 1887 are as follows:

"§ 583. If the judge of any District Court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

"§ 584. If the judge of any District Court, in Alabama, California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee or West Virginia is not present at the time for opening the court, the clerk may open and adjourn the court from day to day for four days; and if the judge does not appear by two o'clock on the afternoon of the fourth day, the clerk shall adjourn the court to the next regular term. But this section is subject to the provisions of the preceding and next sections."

"§ 671. If neither of the judges of a Circuit Court is present to open any session, the marshal may adjourn the court from day to day until a judge is present: *Provided*, That if neither of them attends before the close of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court to the next regular term.

"§ 672. If neither of the judges of a Circuit Court be present to open and adjourn any regular or adjourned or special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term."

"§ 2013. The Circuit Court, when opened by the judge as required in the two preceding sections, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this Title, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and

jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court."

Section 2013 had reference to the functions of the Circuit Court in election matters, and has been repealed.

The account here in suit is not for the attendance of the clerk under sections 583, 584, 671 and 672, but for attendance under sections 574 and 638, which are hereafter given in this opinion.

It will be observed that the act of 1887 recognizes the right of the clerk to a per diem compensation in two states of case, namely, "when the court is opened for business, *or* business is actually transacted in court."

What do those words mean? We are informed by the representatives of the Government that for nearly forty years prior to 1886 it had been the practice of its accounting officers to allow a per diem compensation to clerks for attendance, when court was opened by the judge and adjourned without transacting any business; and that such practice had been sanctioned by an unbroken line of decisions in the Federal courts. And it is suggested that the purpose of the act of 1886 was to break up that practice. All this only serves to prove that Congress used the words found in the act of 1887 with full knowledge of the former practice, and of the change made, or supposed to be made, by the act of 1886. It is clear that the words used, reasonably interpreted, indicate a purpose to allow the per diem compensation for attendance as well when the court was opened for business, whether any business was actually transacted or not, as when business was actually transacted in court. It is said that no business could be lawfully transacted "in court" unless the judge was personally present. We do not assent to that view. It rests upon a construction which is too literal. The services for which Finnell's account was rendered constituted business actually transacted in court, unless it be that a clerk could never enter any order unless the judge was, at the time, in the place, room or building where his court was ordinarily held. But we cannot so adjudge. There are many things that may be legally done by a clerk pursuant to the written order of a judge sent to him, and which, being done, may be fairly held to constitute business "actually transacted in court." This much is to be implied from sections 574 and 638 of the Revised Statutes, which are as follows:

"§ 574. The District Courts, as courts of admiralty, and as courts of equity, so far as equity jurisdiction has been conferred upon them, shall be deemed always open, for the purposes of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any District Judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in

term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

"§ 638. The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, rules and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any judge of a Circuit Court may, upon reasonable notice to the parties, make, and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

As will be seen from those sections, the District and Circuit Courts of the United States are always open for the transaction of certain kinds of business which, we think, may be transacted under the orders of the judge, who may at the time be absent from the place, room or building in which the court is held. The business transacted by the appellee was such as could be transacted by the clerk under the orders of the judge. It is too narrow an interpretation of the statute to hold that such business was not actually transacted in court. This whole subject was carefully considered and the statutes relating to it fully analyzed by Judge Baker in *Butler* v. *United States*, 87 *Fed. Rep.* 655.

These views are justified by long practice in the Department, and upon that we may properly rest our affirmance of the judgment of the Court of Claims. It is found as a fact that the present appellee, in every account rendered by him since 1882, has charged for services similar to those set out in the account here in suit, and such accounts were uniformly allowed and paid up to June 30th 1893. And on his account for the period from January 1st 1892 to June 30th 1894 he obtained judgment in the Court of Claims, which judgment was paid—no appeal having been prosecuted by the United States. *Finnell* v. *United States*, 32 *Ct. Cl.* 634. It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 *U. S.* 219; *Wisconsin C. R'd Co.* v. *United States*, 164 *U. S.* 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many

years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 *Wheat.* 206, 210; *United States* v. *Philbrick*, 120 *U. S.* 52, 59; *United States* v. *Johnston*, 124 *U. S.* 236, 253; *United States* v. *Alabama G. S. R'd Co.*, 142 *U. S.* 615, 621. Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests.

The judgment of the Court of Claims is

Affirmed.

Mr. Justice GRAY took no part in this decision.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 523—October Term, 1901.

The United States, Appellant,
vs.
Joseph C. Finnell.
} Appeal from the Court of Claims.

[April 21, 1902.]

Mr. Justice Brown dissenting.

From the passage of the act of 1791, fixing the compensation of officers of the courts of the United States, the subject of fees for attendance upon the Circuit and District Courts appears to have been one of constant dispute between the officers on one hand, who naturally seek a construction of the fee bill favorable to them, and the Treasury officials upon the other, whose duty it is to supervise and pass upon the accounts of these officers. A statement of some, although by no means all, the acts of Congress upon this subject may aid in the solution of these difficulties. The earliest is that of March 3, 1791, (1 Stat. 216,) wherein there was allowed "to the clerk of the District Court, for attending in the District or Circuit Court, five dollars per day." The act, however, was made temporary, and at the next session, May 8, 1792, (1 Stat. 277,) certain changes were made, though none in the matter of attendance.

The law upon the subject of attendance was apparently not changed until April 18, 1814, (3 Stat. 133,) when it was provided, under "an act to lessen the compensation" of such officers, that there should not be allowed or paid to the clerk of the Circuit or District Courts of the United States in Massachusetts, Rhode Island, Connecticut, the Southern District of New York, or Pennsylvania, "any daily compensation for attending on the said courts." Why this discrimination was made we have no means of knowing, but the act was repealed March 8, 1824. (4 Stat. 8.) No important change was made in the law until 1842, when in the Civil and Diplomatic bill of May 18, (5 Stat. 475, 484,) it was provided that no per diem compensation should be paid to clerks for attendance upon the Circuit or District courts "while sitting for the transaction of business under the bankrupt law merely, or for any portion of the time during which either of said courts may be held open, or in session, by the authority conferred in that law. . . . And no per diem or other allowance

shall be made to any such officer for attendance at rule days of the Circuit or District Courts," or for more than one per diem while both courts are in session.

But even before this act of 1842 was passed, it had been held by Mr. Justice Story in *United States* v. *Cogswell*, (3 Sumn. 204,) which involved the validity of marshal's charges for attendance upon rule days, that as the marshal did not either travel to or attend these rule days at the clerk's office, his claim was for a constructive travel and attendance; "but we are of opinion that this charge, whatever might be its validity, if the marshal had actually traveled and attended at these rules, is, under the circumstances, wholly inadmissible. To justify the charge an actual travel and attendance are, in our judgment, indispensable."

By act of February 26, 1853, (10 Stat. 161,) R. S. sec. 828, the whole subject of fees was revised, and an attendance fee allowed to the clerk of $5 per day for his attendance on the court "while actually in session." By that act the words "while actually in session" were first introduced into the law. It is evident that some change was contemplated by the use of these words. For some purposes, notably in admiralty and equity cases, (R. S. §§ 574, 638,) the court may be deemed to be sitting when a judge is present upon a rule day, or makes an order which can only be made by the court; but, as we shall show hereafter, no attendance was contemplated on these days, at least in the absence of the judge.

The words "actually in session," found in the act of 1853, are emphasized by the sundry civil appropriation act of March 3, 1887, (24 Stat. 509, 541,) wherein it is enacted as follows: That hereafter no part "of any money appropriated (shall) be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court, except for days when the court is open (opened) by the judge for business, or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts." The special sections here mentioned and reproduced in full in the opinion of the court may be dismissed from consideration, as, with the exception of section 2013, since repealed, they relate to cases where there is no judge present at the opening of the term, when special authority is given to the clerk or marshal to adjourn the court from day to day until a judge is present. As no claim is made in the case under consideration for attendance under these sections, they are only important here as indicating the will of Congress that neither the clerk nor the marshal, should have an unlimited discretion in opening the court in the absence of the judge, and requiring a special authority for that purpose. These sections undoubtedly contemplate a special exigency, to prevent a lapse of the term, which might follow from the absence of the judge, and to allow the court to be adjourned for a limited number of days.

In two of these sections (584 and 671) there is a provision that, if the judge does not attend before the close of the fourth day, the court shall be adjourned until the next regular term. We have already held in the case of *United States* v. *Pitman*, (149 U. S. 669,) that the officers are entitled to per diem fees for attendance under these sections, the same as if the judge were present and business were transacted.

By Rev. Stat. sec. 828, under which this claim is made by the petitioner, the court must have been "actually in session," and by the act of 1887 the court must have been opened by the judge for business, or business must have been actually transacted in court. There is no conflict between these acts, since, in order that the court be opened *by the judge* for business, it must be "actually in session," and if business be actually transacted *in court*, the court must be open for the transaction of such business. In either case the court must have been actually opened *by the judge* or actually in session, which amounts to the same thing. As the petitioner bases his claim upon section 828, we shall inquire, first, when the court is *actually in session*. It is certainly not in session upon rule days, since, by by Rev. Stat. section 831, "no per diem or other allowance shall be made . . . for attendance at rule days of a District or Circuit Court." We are then remitted to the real question in this case: When is a court actually in session, for we agree entirely in the opinion of the court that if the court be opened by the judge in person, and no business is transacted, the per diem compensation is still payable.

We had supposed the law to be that no court could be in session without the presence of a judge, and that the sections above cited from the opinion of the court in this case (583, 584, 671, 672,) allow an attendance to be charged, not because the court is actually in session, but to prevent a lapse of the term, when the officers are supposed to be present and in readiness, should the judge appear. Bouvier says (Law Dict.) in giving a definition of the word "court" and the different styles of court, "that the one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called *the court* as distinguished from the accessory and subordinate officers." So, too, in Bacon's Abridgement, a court is defined as an incorporeal political being, which requires for its existence the presence of the judges.

Thus in *State* v. *Judges*, (32 La. Ann. 1261,) it is said: "The court is an incorporeal political being, which requires for its existence *the presence of the judges*, or of a competent number of them, and a clerk or a prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court." A similar definition is given in the *Lawyers' Tax Cases* (8 Heisk. 650.) So in *Shoultz* v. *McPheeters*, (79 Ind. 376,) discussing the powers of a master commissioner,

the court is said to be "a tribunal organized for the purpose of administering justice, and presided over by a judge or judges." So a court is defined in *Mason* v. *Woerner*, (18 Mo. 570,) to be a tribunal established for the public administration of justice, and composed of *one or more judges*, who sit for that purpose at fixed times and places, attended by the proper officers. And in *White County* v. *Gwin*, (136 Ind. 562,) a court is defined as consisting of persons, officially assembled at a time and place fixed by law for the administration of justice, although a judge alone does not constitute a court. (*Gold* v. *Vermont Central Railway Co.*, 19 Vt. 478.) But the presence of a judge is indispensable. (*Hobart* v. *Hobart*, 45 Ia. 503; *Levy* v. *Bigelow*, 6 Ind. App. 677; *Michigan Central R. R.* v. *Northern Indiana R. R.*, 3 Ind. 245.)

In *Davis* v. *Township of Delaware*, (41 N. J. Law, 55,) where the question arose as to the validity of a verdict taken by a crier in the absence of the judge and clerk, it was held that the verdict so taken was entirely invalid. "It seems a profitless labor to discuss so obvious a proposition." "No verdict therefore is valid unless given openly in court." It was held, however, in that case that the record of the court, showing the verdict of the jury to have been returned into the court, imported absolute verity.

So, too, in *In re Terrill, petitioner*, (52 Kan. 29.) This was a writ of *habeas corpus* in which the prisoner, convicted of murder, claimed his release, because his trial was had at a time not authorized by law. It appears that the judge was not present at the time and place when the term should have begun, nor for several days afterwards, and after several adjournments the clerk attempted to adjourn the court, until a later day, when the judge appeared and the prisoner was tried It was held that the failure of the judge to appear and open court upon the day appointed resulted in the loss of the term, and that the proceedings were absolutely void. Said the court: "There is ample power in a court which has been regularly convened to adjourn to a future time, provided it be not beyond the term; but in the absence of a statute authorizing it, the clerk or other ministerial officer cannot act for the judge in either opening or adjourning court. The clerk is a ministerial officer, and, without statutory authority, can exercise no judicial functions. The opening, holding and adjournment of court are the exercise of judicial power to be performed by the court. To perform the functions of a court, the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law. . . . 'To give existence to a court, then, its officers and the time and place of holding, it must be such as are prescribed by law.' (*Hobart* v. *Hobart*, 45 Iowa, 503.) There being no authority in law for the clerk to open and adjourn the court, the consequence of the failure of the judge to appear upon the day appointed for holding court was the loss of the term."

The citation of these authorities, however, appears to be quite unnecessary in view of the express provision of the act of 1887, that no fees for attendance in court shall be payable except for days when the court is opened by the judge for business.

The exhibits to which reference was made in the findings of fact are in the following form:

"Exhibit A.

United States Circuit Court, District of Kentucky.

May term, Monday, October 15th, A. D. 1894.
Court met. Present: Hon. ——— ———, Circuit (or District) Judge.

Julius C. Lang, Admr.,
vs.
The Ches. & Ohio R. R. Co. et al.

"This cause coming on to be heard upon the motion of the Chesapeake and Ohio Railway Company for writ of certiorari and for a rehearing upon the motion to remand, the court having considered said motion and the affidavit filed herein, and the original petition for removal herein having been exhibited to the court, and being now duly advised, it is ordered that the clerk of the Kenton Circuit Court at Independence, Ky., be, and he hereby is, directed and ordered to make and transmit to the clerk of the United States Circuit Court for the District of Kentucky, at Covington, Kentucky, a true and correct transcript of the papers and proceedings in this case. The order remanding the case is now set aside and a rehearing of the motion to remand is hereby granted and is set for Saturday, October 20th, A. D. 1894, at 10 o'clock A. M. in chambers, at Cincinnati, Ohio.

"It is now ordered that court stand adjourned until Friday, November 2nd, A. D. 1894."

(The others are in form like unto this.)

It will thus be seen that, while the form of the journal entry showed an exact compliance with the law, the findings of fact show that it was a mere form, and that the facts found by the court were wholly inconsistent with the proceedings as they appear upon the journal, and were presented to the accounting officers. The form shows that the court met. It did not meet. That the circuit or district judge was present. He was not present. That a certain cause in each case came on to be heard and that an order was made in such cause, none of which took place at the time or place indicated; but the order was made and transmitted by mail to the clerk. The final entry is that the court stands adjourned until a definite day, when the actual fact was that the day to which adjournment was made was left blank, and when another such order, decree or proceeding was received to be entered, such blank was filled with the date on which it was received, and another entry similar to the above, opening and adjourning the court to a blank day, was made. From the nature and character of business transacted on the days on which the court was opened and adjourned as aforesaid, it appears that with scarcely an exception they

were orders which might have been made and which in fact were made in chambers. While the judge in each case directed the order to be entered, he did not direct the court to be opened for that purpose.

Now, while as before stated, if the court be properly opened, no business need be done to entitle the officers to their attendance fees, and when authority to do so is given by statute, the clerk or marshal may open the court and adjourn it, we know of no authority under which a clerk may open court at his own will, when he may have some order to enter; nor do we know of any authority under which even a judge may open court without his personal presence, unless specially authorized to do so by statute. Under the practice pursued in this case the court might be opened every day in the year, provided some excuse be found in the shape of an order signed by a judge, though the work actually done in court might not have occupied ten days during the entire year.

The opening of a court is a solemn judicial act, and must be performed by the judge in person, unless special authority is given by statute for its performance by a subordinate officer. No such authority is found in this case. It is true that in *United States* v. *Pitman*, (147 U. S. 669,) it was held that the officers were entitled to their attendance while waiting for the judge to appear. We said in that case that "the court should be deemed actually in session within the meaning of the law, not only when the judge is present in person, but when, *in obedience to an order of the judge directing its adjournment to a certain day*, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge." This, however, was said with particular reference to the case under consideration, and is no authority for the practice pursued in this case, since the court was not opened in obedience to any order from the judge.

Great stress is laid in the opinion of the court upon the practice of the departments in this connection, and upon the finding that the present appellee in every account rendered by him since 1882 has charged for services similar to those set out in the account here in suit, and that such accounts were uniformly allowed and paid up to June 30, 1893. An inspection of the entries in this case will show the weight to be attached to this practice of the departments. When it appears upon the journal that the court met, that the judge was present, that an order was made in court, and that the court adjourned to a specific date, how are the accounting officers of the Treasury to know that such was not the fact? The practice of the departments to pay these bills might have continued for a century without anything to show that they were apprised of the actual facts appearing in the findings, and no inference can be drawn from such practice. Had it appeared that in such cases the facts set forth in these findings had been called to the attention of the accounting officers the rule would be differ-

ent; but we fail to see how the practice could afford any justification for these charges. A practice like this is liable to throw one's notions of differencies of form and substance into sad confusion. Fictions in pleading were long, and still are, tolerated in many cases, but we know of no definition of the word "fiction" which authorizes journal entries like this, based upon the findings shown in this case. Had the facts been actually stated in connection with these entries, we imagine the practice of the department would have been so quickly changed that no argument based upon it could have been made.

Petitioner in his brief claims his attendance under sections 574 and 638, fully set forth in the opinion of the court, which, construed together, declare that courts of admiralty and equity "shall be deemed always open" for the purpose of filing any pleading, issuing and returning process, and making and directing interlocutory motions, orders, &c., preparatory to the hearing upon their merits of all cases pending therein. No claim under these sections, however, is made in the petition, wherein the petitioner relies alone upon section 828 for attendance when the court is "actually in session."

There are, however, so many other answers to his claim under sections 574 and 638 that no elaborate discussion of them is necessary. (1) These three sections, 574, 638 and 828, are all taken from the Revised Statutes, and must be construed together, as if they constituted parts of one act, as they really do. Nothing is said about attendance in the first two of these sections, and all the orders are such as are usually made at chambers. Both sections provide upon their face that the proceedings therein authorized may be made at chambers, or in the clerk's office, and in vacation as well as in term; but in a separate and distinct section, 828, providing for clerk's fees, his fees for attendance are limited to such as are earned while the court "is actually in session." Of course, if there be any conflict between these sections the later rules, but in addition to that it is inconceivable that Congress, while providing specially for attendance while the court is in actual session, should throw the door wide open in sections 574 and 638 to a charge for attendance upon every day when the judge may happen to make an order, whether the court be actually in session or not. All that is meant by sections 574 and 638 is a recognition of the old custom that courts of admiralty and equity are presumed to be always open for incidental purposes, a custom as old as the very existence of these courts. (2) The list of the orders actually made by the judge, for the entry of which the clerk claims attendance in this case, shows that none of them were in admiralty cases, and comparatively few in equity cases. The great bulk were in common law cases. The claim under these sections was evidently an afterthought. (3) If these sections be construed as opening the door for an attendance fee each time an order was made, then they were

clearly repealed by the act of 1887, under which the clerk has a right to compensation only when the court is opened *by the judge* for business, or business is actually transacted *in court*, and when they attend under certain sections, in which sections 574 and 638 are *not* included.

For these reasons I am compelled to dissent from the opinion of the court in this case.

I am instructed to say that Mr. Justice WHITE and Mr. Justice PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.